No. 3514.

United States Circuit Court of Appeals

For The Ninth Circuit

GEORGE E. KNOWLTON and
JERRY KNOWLTON,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Brief of Defendant in Error

Upon Writ of Error to the United States District Court for the District of Oregon.

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JOHN MANNING and JOHN J. BECKMAN,
Both of Portland, Oregon,
Attorneys for Plaintiffs in Error.

LESTER W. HUMPHREYS, United States Attorney for Oregon, and HALL S. LUSK, Assistant United States Attorney, both of Portland, Oregon, Attorneys for Defendant in Error.

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STATEMENT OF FACTS.

George E. Knowlton and Jerry Knowlton, brothers, were convicted under an indictment charging them with violation of the Reed amendment. The specific charge was the transportation of intoxicating whiskey from the State of California into the State of Oregon, the laws of which prohibited the manufacture and sale therein of intoxicating liquor for beverage purposes.

The Defendants were arrested by Government Special Agent Tom Word on June 10, 1918, in Oregon, about 35 miles from the California State line. Word at the time was bringing a prisoner from Lakeview, Oregon, to Portland, accompanied by E. E. Woodcock, Sheriff of Lake County. When the Government Agent came upon them, George Knowlton and his wife, Florence, were asleep in a Stutz automobile, and Jerry Knowlton was in a Mercer car drawn up on the side of the road to Bend. Both automobiles were loaded with liquor. The defendant George Knowlton, stated to the officer that they had a little liquor for their own use—about 15 or 20 cases—which they had bought in Oregon. (Transcript pp. 44-51).

The defendants both told the Government Agent and Sheriff Woodcock that they bought the liquor which was in the cars from some one in Oregon; and that there was no Federal charge against them. (Transcript p. 50).

On June 9, 1918, two men and a woman came into the store of H. W. Laugenour, at Davis Creek, California, which is 25 miles north of Alturas, California, and 12 or 15 miles south of the Oregon State line. One of these men, identified by Laugenour as Jerry Knowlton, came to the counter and bought some provisions. Laugenour was unable to identify the woman, and picked out a spectator among the gathering in the court room as the other man. Afterwards Laugenour, who had been in the automobile business from 1903 to 1912, saw through the store window two automobiles, one a Stutz, the other a Mercer. (Transcript, pp. 51 and 52).

The road where the defendants were found is the main traveled road from Lakeview to Bend. Lakeview is 15 miles from the nearest California point, and the nearest large California town on the road to Lakeview is Alturas, which is 45 miles from the boundary line of Oregon. (Transcript, p. 51).

On June 9, 1919, between 1 and 2 o'clock p. m., Jerry Knowlton drove a heavily loaded Mercer car into the garage of Eugene B. Ash, at Alturas, California. Ash repaired a broken frame on the car, and Jerry Knowlton gave him a drink out of a partially filled bottle of brandy which he pulled out of the car. The back of the car seemed to be pretty well filled up, but it was covered over and witness Ash did not know what was inside. (Transcript, p. 53).

On the same day, June 9, 1919, between 10 and 11 a. m., F. L. Kiser, who conducted the Alturas Tire & Battery Co., at Alturas, repaired a tire and furnished gasoline for a Stutz car, in which were a man, and a woman dressed in a khaki suit. The back of the car was flled up level with the back seat and covered over with a blanket or canvas. Keser did not recognize the Defendant George Knowlton or his wife, or Defendant Jerry Knowlton as the persons who were in or driving the Stutz car, and stated that Florence Knowlton was not the woman. The Stutz car, he testified, had white wire wheels, the lights were painted white, and the car was of a kind of maroon color—"witness was not sure the color was maroon, but knew it was red." (Transcript, p. 55).

In June, 1919, Henry Koch was running a lunch counter at Alturas, and on the 8th or 9th of June two men came to his counter and purchased twenty sandwiches—ten beef heart and ten pork. One of these men Koch recognized as Jerry Knowlton, but he could not say who the other man was. Koch thought that Jerry Knowlton came in a machine, because he had heard fellows make a remark about two big machines. (Transcript, p. 56).

Shortly after the defendants were arrested, they had lunch, and Jerry Knowlton took out a box of provisions from his machine, and the Government Agent ate a beef heart sandwich. (Transcript, p. 46).

It was also proven that after the Defendants werearrested Mrs. George Knowlton attempted to escape in the Stutz car; (transcript, p. 46); and that when the Government Agent with his prisoners arrived at The Dalles, and went into a restaurant with George Knowlton, a stranger drove off with the Stutz car, which was later recovered about 26 miles from The Dalles, all the liquor having been taken out and the car left stranded. (Transcript, page 47).

The foregoing is a summary of the testimony for the Government.

The defendants introduced no evidence, except that L. L. Therkelsen, who was in possession of the Stutz car at the time of the trial, and who testified that the color of the wheels of the car was black and of the body red; that there were no stripes on it and that the fenders were black. (Transcript, page 59).

POINTS AND AUTHORITIES.

I.

It is not every hypothesis, but every reasonable hypothesis but that of guilt, that the circumstantial evidence must exclude; the evidence need not demonstrate the guilt of defendant beyond the possibility of his innocence; and if the circumstances as proved produce a moral conviction to the exclusion of every reasonable doubt, they need not be absolutely incompatible, on any reasonable hypothesis with the innocence of accused.

16 Corpus Juris, 765.

II.

The evidence in a criminal case need not exclude the possibility of innocence.

United States vs. Green, 220 Fed. 973.

III.

The general rule is now well settled that in all criminal cases the corpus delicti may be established by circumstantial evidence.

Dimmick vs. United States, 137 Fed. 257—
C. C. A. 9th Circuit.

16 Corpus Juris, 772.

IV.

A jury in a criminal case is not restricted to palpable facts, but may consider all the inferences which reasonably may be drawn from the facts proven.

United States vs. Wilson, 176 Fed. 806.

V.

If an inference of guilt may be fairly drawn, the evidence meets the test of legal sufficiency, and its credibility must be determined by a jury.

United States vs. Green, 220 Fed. 973.

VII.

When the reasonableness of the only hypothesis of innocence propounded presents at least a question upon which men of ordinary intelligence might ordinarily differ, then the rule that to justify

conviction of crime the evidence must be such as to exclude every reasonable hypothesis but that of guilt, is to be applied, not by the court, but by the jury.

Glass vs. United States, 231 Fed. 65.

Chambers vs. United States, 237 Fed. 513.

VII.

The identity of accused is not an element of the corpus delicti.

16 Corpus Juris, 772.

VIII.

The evidence in this case was sufficient to justify the verdict as to both Defendants.

Berryman vs. United States, 259 Fed. 208.

Laughter vs. United States, 259 Fed. 94, 100.

ARGUMENT.

But one question is presented by the brief of plaintiffs in error, namely: The sufficiency of the evidence to justify the verdict.

I.

Taking up first the case of Jerry Knowlton, we believe that it can readily be shown that the evidence was ample under any standard of proof

adopted by the courts. Jerry was found asleep soon after 4 o'clock in the morning of June 10, 1919, in the Mercer car at a point on the road to Bend, Oregon, about 35 miles from the California State line. His brother, George, and the latter's wife, were found at the same time and place under like circumstances in the Stutz car. Both cars were loaded with intoxicating liquor, a fact which the men admitted. Some of this liquor from the Mercer car was introduced in evidence. On June 9, 1919, Jerry Knowlton bought some provisions in a store at Davis Creek, a town about 12 or 15 miles South of the Oregon State line, and about 25 miles north of Alturas; another man and a woman were with him; and Laugenour, the storekeeper, who had been in the automobile business for nine years, saw two automobiles outside, which he described as a Stutz and a Mercer.

On the same day, June 9, Jerry Knowlton drove the Mercer car into a garage at Alturas, and had some repairing done. His car was heavily loaded—so much so that it broke through the floor of the garage. He took a "partly drank" bottle out of the car and gave a drink to the garage man, Eugene B. Ash. Ash described the back of the car as pretty

well filled up, but it was covered over and he did not know what was in it. This corresponds with Government Agent Word's testimony that in the Mercer car there was a wide mattress over the top and some blankets over that.

On June 8th or 9th, according to the testimony of Henry Kock, two men and a woman came to his lunch counter at Alturas and bought ten beef heart and ten pork sandwiches. He identified Jerry Knowlton as one of the men, and he thought Knowlton came in an automobile because he heard some remarks made at the time about two nice big machines. It was a beef heart sandwich which the defendant gave Agent Word when they had lunch together.

The **corpus delicti** in this case is the transportation of intoxicating liquors from California into Oregon. Plaintiff in error, Jerry Knowlton, says that that has not been established. We submit that it has been established.

We know from the authorities that the corpus delicti may be shown by circumstantial evidence. We know further that where the proof is by circumstantial evidence, it is not every hypothesis, but

every reasonable hypothesis that the circumstantial evidence must exclude before a judgment of conviction is warranted.

Now, the circumstances adduced in this case were, in a word, these: That Jerry Knowlton was in Alturas, California, about 45 miles from the Oregon State line, with a heavily loaded Mercer automobile, on the afternoon of June 9; that the automobile was so covered up that its contents could not be seen; that Jerry Knowlton took a bottle of brandy out of the automobile; that on the same afternoon he was in Davis Creek, California, about 25 miles closer to the Oregon State line with the same automobile; and that early on the morning of June 10, shortly after 4 o'clock in fact, he was in Oregon, about 35 miles from the California State line, with the same automobile, heavily loaded with liquor—201 bottles, to be accurate.

The natural and reasonable inference from those facts is that Jerry Knowlton brought the liquor with him from California; that the load which made his automobile so heavy as to break through the floor of the garage at Alturas was precisely the same load as that which the officers found in his car on the road to Bend. This is not

conjecture or suspicion, but deduction from proven facts.

There is a hypothesis, of course, which is consistent with Jerry Knowlton's innocence. There usually is such a hypothesis in circumstantial evidence cases, but the evidence in a criminal case need not exclude the possibility of innocence. United States vs. Green, 220 Fed. 973. It might be predicated that some time between the afternoon of June 9 and the early morning of June 10, Jerry Knowlton came from Alturas into Oregon, and after arriving in the State obtained the liquor and went to sleep on the road to Bend. But that is not a hypothesis which would appeal to a reasonable man; on the contrary, it is forced, and especially does it seem so when we reflect that Oregon was a "dry" state, where it was difficult and unlawful, and California was a "wet" state where it was easy and lawful to obtain intoxicating liquors.

Is it the law, that the Court must in such a state of facts peremptorily deny to the jury the right to say which is the reasonable deduction from the proven circumstances? We believe not.

"If an inference of guilt may be fairly drawn," it is said in United States vs. Green, 220 Fed. 973,

"the evidence meets the test of legal sufficiency, and its credibility must be determined by a jury."

In Glass vs. U. S. 231 Fed. 65, the court was asked to give this instruction:

> "If there are any number of theories fairly deducible from the evidence which are compatible with guilt, and a single theory fairly compatible with innocence, the jury must adopt the theory of innocence."

"The defendant," it was said, "has not indicated the source of the proposition. We imagine that it was intended to embody the principle of the rule that to justify conviction of crime, the evidence must be such as to exclude every reasonable hypothesis but that of guilt. (Isbell vs. U. S. 227, Fed. 788). While such a rule is recognized, the question is always present—by whom is it to be applied? In some cases no doubt by the court, but certainly not in such a case as this where the reasonableness of the only hypothesis of innocence propounded presents at least a question upon which men of ordinary intelligence might honestly differ. Hart vs. United States, 84 Fed. 799. The trial court was therefore right in leaving the jury to determine

whether the defense that the goods were sold before bankruptcy and the proceeds applied to the payment of the defendant's debts, was reasonable or not. The jury found that it was unreasonable, thereby destroying the 'single theory fairly compat-- ible with innocence.' "

An attempt is made in the brief of counsel for plaintiff in error to deduce something from the fact that Jerry Knowlton claimed to the officers when convicted that he bought the liquor in Oregon, and that there was no evidence tending to show that he did not buy it in Oregon. It was not necessary for the Government to undertake the proof of that kind of a negative, except to the extent of showing by the circumstances that the defendant had the liquor in California and therefore must have transported it into Oregon. But, it is worthy of note, and proper to remark, since counsel appears to be relying on this self-serving declaration as evidence in their own behalf, that no such evidence was offered at the trial, and in fact no evidence whatever was given by defendants to explain away the incriminating circumstances.

II.

The case as to George Knowlton differs from

that as to Jerry in that no witness was able to identify him as the man who was seen in the Stutz car in California. But two men and a woman came into H. W. Laughenour's store at Davis Creek, on June 9, when Jerry bought the sandwiches, and outside of the store were a Mercer automobile and a Stutz automobile. A Stutz car, with a man and woman in it, obtained gasoline from the garage of F. L. Keser in Alturas on the morning of June 9. Two men, one of whom was Jerry Knowlton, bought sandwiches from Henry Kock at his lunch counter in Alturas on June 8th or 9th, and Kock heard some talk in that connection about two nice big machines.

Keser testifed that the back of the Stutz car was piled up level with the back seat and covered over with a blanket or canvas. The Stutz car when found by the officers, had some blankets over it and a gunny sack, and George Knowlton and Florence, his wife, were asleep in the front seat.

From the foregoing it is plain that a man and a woman and a Stutz car accompanied Jerry Knowlton to Davis Creek; and that a man and a woman in a Stutz car were in Alturas on the same day that Jerry Knowlton was there in his Mercer; and a man was with Jerry Knowlton when he

bought sandwiches from a lunch counter at Alturas.

And when the defendants were found on the road to Bend, on the very next morning, George Knowlton and his wife were sleeping in the Stutz car, which in a general way corresponded to the description given by F. L. Keser of the car for which he had furnished gasoline and mended a tire. While it is true that there is a discrepancy as to some details between Keser's description of George Knowlton's car and the testimony on that point of L. E. Therkelsen for the Defendants, this can be taken as nothing more than a commentary on the fallibility of human testimony, memory and powers of observation. The value of Keser's testimony was a matter to be weighed by the jury, which, despite this discrepancy, evidently believed that the Stutz car he described was the same Stutz car in which George Knowlton and the intoxicating liquor were found.

The man who accompanied Jerry Knowlton was not a resident of Alturas or Davis Creek, for he was unknown to the witnesses from either of those places. He was a stranger. Now, even in the face of the failure of the Government to identify that man by any witness able to say that it was George

Knowlton, the brother of Jerry, are the jury to be told that they must ignore the cogent force of the circumstances pointing to the conclusion that George Knowlton was with Jerry Knowlton in Alturas and Davis Creek, on the theory that it is equally possible that he joined his brother Jerry after the latter came into Oregon. To adopt the latter theory, the jury must conclude that a man and a woman—not George and Florence Knowlton—in a Stutz car were with Jerry in Davis Creek and in Alturas on June 9th, that they left him before the early morning of the following day, and that sometime during the night of June 9-10, George and Flonence came along in another—or perhaps the same Stutz car and went to sleep with George on the road to Bend. Such a theory is not only not rational, but borders closely on the absurd.

It only remains then to consider whether there was any substantial evidence to show that George Knowlton transported intoxicating liquor from California into Oregon. It will be remembered that Keser testified that the back of the Stutz car for which he furnished gasoline, was piled up level with the back seat and covered over with a blanket or canvas. Now, the Government Agent, testified

that the Stutz car had some blankets over it and some gunny sacks. There were 234 bottles of liquor in it.

That the Stutz car was loaded with something when in Alturas is evident. The purpose of covering the contents with a blanket was of course concealment. Men don't cover their ordinary legitimate baggage in that manner, and this was a circumstance to be considered by the jury.

As to the rest, while there was no direct evidence, as in the case of Jerry Knowlton, of the presence of liquor in the Stutz car while in California, the argument already advanced as to the rational conclusion to be drawn from the proven facts, applies equally to the case of George Knowlton, and it was for the jury to determine whether the hypothesis that the liquor was obtained in Oregon between the time that the defendants left Davis Creek and the time they went to sleep on the road to Bend was a reasonable one.

It was, indeed, not necessary to prove that any liquor was actually transported in the Stutz car. If the proof of transportation in the Mercer car was sufficient, George Knowlton was in the position of

one aiding and abetting the commission of the crime, and his conviction can be sustained on that theory.

The statement in counsel's brief that there was no substantial testimony to show that the liquor in the Stutz car—George Knowlton's—was intoxicating, is hardly correct. It is true that none of this liquor was introduced in evidence. That was impossible, as some one, evidently a confederate of the defendants, managed to make off with it at The Dalles. But Sheriff Woodcock testified that he tasted some whisky from a bottle in the Stutz car; and the defendants both admitted that it was liquor, which it need scarcely be stated, is common parlance for intoxicating liquor. And George Knowlton, testified Government Agent Word, "begged me all night to let him open a bottle and let him take a drink."

III.

Most of the principles of law cited in the brief of plaintiffs in error are incontestible. The cases relied on, however, do not admit of the application claimed for them. We shall notice only two, for the purpose of giving point to this statement.

In Goff vs. United States, 257 Fed. 294, there was no evidence apart from the admission of the defendant (which of course required corroborative proof) that the defendant's automobile was ever in another state.

In Isbell vs. United States, 227 Fed. 788, the questions were:

1. Did defendant know that he was transporting liquor? 2. Whether the defendant's destination was Oklahoma or Missouri, the rule being that to transport liquors **across** that part of Oklahoma which was formerly Indian Territory would not be a violation of the Act.

On the second question the only evidence was the fact that the liquor was siezed on the road from Chetopa, Kansas, to Vinita, Oklahoma, 18 miles from the former place and that two or three bottles of wine in Isbell's automobile were marked "for Mrs. Isbell." There was no evidence that the bottles were so marked by Isbell, or with his knowledge or consent. Isbell claimed that he had been hired to haul the goods from Chetopa, Kansas, to Tiff City, Mo.

"No witness came to testify that the des-

tination of the goods was in the State of Oklahoma. All the witnesses testified that it was Tiff City, Mo., the route over which the goods were removed was not inconsistent with that destination, the marks "For Mrs. Isbell," on two or three wine bottles, unsupported by any proof tending to show who made them, do not rise to the dignity of evidence, and there was no substantiated evidence, nothing but suspicion, that the destination was Oklahoma, or that Isbell was consequently guilty."

The other cases cited by counsel, we believe are shown by the statements of their facts in the brief to have little if any bearing on the question at bar.

IV.

It is said at page 16 of the brief for plaintiffs in error that there was no evidence to show what the defendant's destination was. There was evidence, however, that the defendants were found in Oregon, and no claim whatever was made that Oregon was not their destination. On this point, as well as on the general questions of the sufficiency of the evidence, we quote from the opinion in Berry-

man vs. United States, 259 Fed. 208, where the defendants were convicted of violation of the Reed Amendment:

"Berryman and Gold claim that the evidence did not justify the submission of their case to the jury. Both of them testified on the trial that they had procured the liquor in Paducah, Ky., and were bringing it from that place. They lived in Memphis, where they were partners in operating a taxicab line, and they had driven from Memphis to Paducah for the purpose of getting the liquor. Their guilt, under their own statement, is not to be doubted, except for the fact that they also claimed that they had procured it for a man in Helena, Ark., and, that, when arrested they were making the through trip from Paducah to Helena for delivery there to him. If this was true, they were not guilty, since the sale of liquor in Arkansas was not prohibited. United States vs. Gudger (April 14, 1919) 249 U. S. 373, 39 Sup., Ct. 323, 63 L. Ed. 653. However, the facts brought out on cross-examination threw grave doubt upon the truth of so much of this story as involved the Helena destination, and the jury was under no obligation to believe it. From all the facts, it was an entirely legitimate inference that Memphis

was the final destination of the liquor; and the jury may, of course, convict upon legitimate inferences, as well as upon direct testimony.

"In Tucker's Case, the additional point mainly urged against the judgment is that there was no sufficient proof of the corpus delicti to corroborate the defendant's confession. The proposition that there must be such corroborative evidence in order to justify a conviction is not questioned by the District Attorney, but he affirms the existence of such evidence. The testimony is that Tucker, at the time of his arrest, admitted that he got the liquor in Paducah and was carrying it to Memphis. It is said that this was the only evidence tending to show one element of the crime charged, viz. transportation across the state line into Tennessee, and that, since the crime was not complete without this interstate transportation, the commission of the crime had not been shown at all, except by this confession. Without going at all into the refinements of the legal rule, there are two answers to this contention, either of which is sufficient: The first is that the rear cushion of the automobile had been taken out, apparently to facilitate the packing of the load which was being carried, and Tucker had in his pos-

session an express receipt therefor, issued at Paducah indicating that he had been in Paducah and delivered this cushion to an express company for transportation to Memphis. This distinctly tended to show that the journey on which he was then engaged began in Paducah.

"The other answer is that the liquor itself was there and was being transported, and its presence, in Tucker's charge, under these circumstances, was strongly corroborative of his statement that he had brought it across the state line. Especially is this true, in view of the fact that he could not have purchased it in Tennessee, nor could any one have delivered it to him in Tennessee, without violating the Tennessee law, and it is a fair presumption, and in Tucker's favor, that he procured it where he could easily do so without violating any state law, rather than where its acquisition must have been surreptitious, difficult of accomplishment and in defiance of the laws of the state. Rivalto v. United States, 259 Fed. 94-C.C.A.-(January 17, 1919), and see Robilio v. United States, 259 Fed. 101,-C.C.A. (March 5, 1919). This view also disposes of the contention that it was error to charge that the possession of

the liquor gave the confession sufficient corroboration."

As further throwing light on the general question of the sufficiency of the evidence, we quote from Laughter vs. United States, 259 Fed. 94, 100; also a Reed Amendment case:

"In the Rivalto Case, No. 3221, the further specific objection is that there was no evidence to justify conviction. We think the circumstances sufficiently point to the conclusion that Rivalto participated in ordering or transporting or causing the transportation of a quantity of liquor which might have been for purposes of resale and which was taken from an interstate train on its arrival in Memphis. The only plausible objection to the sufficiency of proof is that this train had traveled for more than 100 miles and made several stops after it entered the state of Tennessee, and that there is nothing to show that the liquor was on board before the train came into the state. The train had come directly through from Cairo, Ill., where liquor could lawfully be bought. For it to have been purchased and loaded upon the train in Tennessee would necessarily have involved violation of the Tennessee laws, and to assume Tennessee origin

would be to presume that at least one, and probably several offenses against Tennessee laws had been committed. The liquor was in bottles which bore labels purporting to show that it had been recently bottled for some dealer in Cairo. These labels were received in evidence without objection. The combined force of these circumstances was enough to justify the jury in thinking that the journey which ended in Memphis began in Cairo."

The evidence seems to us to be sufficient, and we believe that the judgment of conviction should be sustained.

Respectfully submitted,
LESTER W. HUMPHREYS,
United States Attorney.
HALL S. LUSK,
Assistant United States Attorney.
Attorneys for Defendant in Error.